In the Supreme Court of the United States.

OCTOBER TERM, 1900.

HIPPOLITE FILHIOL ET AL., PLAINTIFFS in error,
v.
CHARLES E. MAURICE, CHARLES G. CONVERS, and WILLIAM G. MAURICE.
No. 236.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

STATEMENT.

This is an action of ejectment instituted in the United States circuit court for the eastern district of Arkansas for the recovery of a certain tract of land in the city of Hot Springs, Garland County, Ark., situated on the permanent reservation at said Hot Springs, known as Bath House Site No. 8, together with certain sums as rent therefor. The action is based upon a certain alleged grant to the plaintiffs' ancestor, Don Juan Filhiol, made on February 22, 1788, by the then Spanish governor of the province of Louisiana, through whom the plaintiffs claim as heirs at law.

The defendants in error demurred to the declaration upon the ground that said declaration did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court below, and the plaintiffs electing to stand upon their declaration, and refusing to amend, the action was dismissed. From this decision and judgment of the court below the plaintiffs sued out a writ of error to this court.

No opinion was delivered by the court below, although the demurrer was sustained upon the same grounds as was stated in the opinion of the court in the case of *Muse* v. *The Arlington Hotel Company* (68 Fed. Rep., 637), which was a case precisely identical with the case at bar, being an action of ejectment brought by the heirs at law of said Don Juan Filhiol to recover the tract of land on the Hot Springs Reservation on which the Arlington Hotel is situated, and claiming title thereto under the same alleged Spanish grant which is made the basis of title in the action at bar.

In the case of *Muse* v. *Arlington Hotel Company*, however, there were exceptions filed by the defendants to the muniments of title and other exhibits set up in the declaration, as required by the statute of the State of Arkansas in such cases made and provided (Sand. & H. Dig., sec. 2578), and under these exceptions the court in rendering its decision was required to and did go very largely into matters of evidence pertaining to the validity of the plaintiff's title, the object of the Arkansas statute being not only to prevent surprise,

but also to prevent, as far as may be, the discussion of questions of evidence during the trial, so that trials may be rendered more expeditious and the attention of juries not diverted from their exclusive province. But in the case at bar the record does not disclose that any exceptions were filed before the trial to the muniments of title and other exhibits set up in the declaration as required by the Arkansas statute, and hence we shall confine ourselves to ques ions of law and fact properly presented by the pleadings, by prior decisions of this court concerning the same subject-matter, and by those permanent and general laws of which this court will take judicial cognizance.

JURISDICTION.

Before reaching any discussion of the questions arising upon the writ of error in this case, the all-important question of the jurisdiction of this court to maintain the writ is first presented.

It seems clear that no cause of action is stated in the declaration at bar which will admit of a review of the decision of the circuit court of the United States for the eastern district of Arkansas upon a writ of error sued out directly from this court to that. Writs of error may be sued out directly from this court to the circuit courts in cases, among others, in which the construction or application of the Constitution of the United States is involved, or in which the validity or construction of any treaty made under the authority of the United States is drawn in question. (26 Stats., 826.) But a case can only

be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is granted under that instrument in such wise as that a definite issue in respect to the possession of the right can be distinctly deducible from the record; otherwise the judgment of the court below can not be revised on the ground of error in the disposal of such a claim by its decision. (*Muse* v. *Arlington Hotel Company*, 168 U. S., at p. 435; *Green* v. *Cornell*, 163 U. S, at p. 78.) The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege, or immunity dependent on the treaty must be so set up or claimed as to *require* the circuit court to pass on the question of validity or construction in disposing of the right asserted. (*Bourgmeyer* v. *Idler*, 159 U. S., 408; *Muse* v. *Arlington Hotel Company*, 168 U. S., 430–435.) It is settled that in order to give the circuit court jurisdiction of any cause arising under the constitution or laws of the United States or treaties made or which shall be made under their authority the cause of action must appear from the plaintiff's own statement of his claim. (*Muse* v. *Arlington Hotel Company*, 168 U. S., at p. 436, and cases cited.)

Turning now to the declaration of the plaintiffs, we find, first, that it is not even alleged in the body of the declaration that the parties plaintiff and defendant are citizens of different States. There is an inferential statement to this effect in the caption of the complaint, wherein certain parties plaintiffs are described as resi-

dents of various States, but there is no allegation of diverse citizenship in the body of the complaint itself; second, the only allegation in the declaration touching the jurisdictional question at issue is as follows (Transcript, p. 8):

> And for cause of action say that by the fifth amendment of the Constitution of the United States and the third article of the treaty of the United States of America and the Republic of France which was ratified on the 21st day of October, 1803, the *United States* undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the land in controversy and their full enjoyment of the same, but, in violation of the provisions of said treaty and without due process of law and in violation of the fifth amendment of the Constitution of the United States, *defendants* (i. e., Charles E. Maurice, Charles G. Convers, and William G. Maurice) did without condemnation and without compensation to the plaintiffs on or about the 2d day of January, 1897, wrongfully and without right oust the plaintiffs from the possession of the land in controversy, etc.

Either this is an action against private individuals or else it is an action against the United States It is insisted by the claimants that it is an action wholly against private individuals and in no wise an action against the United States, and is ruled by the decision of this court in *United States* v. *Lee* (106 U. S., 196). If this contention be taken to be true, then manifestly there is not drawn in question by this action any

right, title, privilege, or immunity under the Constitution of the United States, nor the validity or construction of any treaty made by the United States. No such right is alleged in the petition, nor was any such question required to be determined by the decision of the circuit court, nor was any such question actually determined by the decision of the said court. Upon this theory the case is purely an action of ejectment between private individuals. Individual defendants were not inhibited by the fifth amendment of the Constitution from taking private property for public uses without compensation, and the petition utterly fails to allege any duty on the part of the individual defendants in and about the Constitutional or treaty rights relied upon. The circuit court held that the plaintiffs' title failed because of noncompliance with the Spanish law. It is not pretended that the treaty, the validity of which confessedly was not in dispute, could be so construed as to compel judicial recognition of unconsummated claims, and it was for the circuit court to determine into what category the alleged claim fell. In doing so the construction of the treaty was not in any wise drawn in question. Even if it be assumed that for the sustaining of the demurrer the court below held that the claim was barred by the act of June 11, 1870, that would only be a matter of construction, and the constitutionality of the act, if held to apply to the claim rather than to the amenability of the United States to suit, was not considered; nor does it appear that the judgment of the circuit court was invoked upon the question. All these

matters could and would have been considered upon proper presentation to the circuit court of appeals, and the decision of that court would have been final under the sixth section of the act of March 3, 1891 (26 Stats., 826). The case presents, therefore, precisely the same jurisdictional question as was before this court in *Muse* v. *Arlington Hotel Company* (*supra*), and is disposed of by that decision. The only way in which the case at bar can be considered as involving the construction or application of the Constitution of the United States or the validity of any treaty made by the United States is to regard the action as an action against the United States, and the allegations of the plaintiffs' petition, as set forth on page 8 of the transcript, as being addressed to a duty which the United States owed to them. If the case be so considered, it is still without the jurisdiction of this court, for the reason that the United States can not be sued except by its own consent, and no such consent is here alleged or shown; it, indeed, can only be shown by an act of Congress passed for that purpose. (*Carr* v. *United States*, 98 U. S., 433; *United States* v. *Lee*, 106 U. S., 196; *Tindal* v. *Westley*, 167 U. S., 204; *Stanly* v. *Schwalby*, 147 U. S., 508–518.) Nor can this result be obtained by so framing the action as to nominally present a case against private persons only, yet really to result in passing upon the property rights of the United States. As was said by Mr. Chief Justice Fuller in *Stanly* v. *Schwalby* (*supra*):

> Whenever it can be clearly seen that the State is an indispensable party, to enable a

court * * * to grant the relief sought, it will refuse to take jurisdiction. (*United States* v. *Lee*, distinguished.)

GENERAL ARGUMENT.

Aside from the jurisdictional issue, it is submitted that the judgment of the court below, sustaining the defendants' demurrer and dismissing the plaintiffs' petition, was clearly right, for the following reasons:

1. The declaration and exhibits do not allege or show legal title to the land in controversy in the plaintiffs or the ancestor through whom they claim.

2. No land is described in the declaration or exhibits which is capable of verification or which is capable of identification with the demanded premises.

3. The declaration does not allege possession of the demanded premises in the claimants or the ancestor through whom they claim.

4. The declaration does not allege or show any right of possession of the demanded premises in the plaintiffs or the ancestor through whom they claim.

5. The published decisions of this court and the public laws of the United States, of which this court will take judicial cognizance, show that the legal title to the demanded premises, as well as the possession and right of possession of said demanded premises, is outstanding in another.

6. The claimants are estopped by their acts and conduct from maintaining this action.

I.

The declaration and exhibits do not allege or show legal title to the land in controversy in the plaintiffs or the ancestor through whom they claim.

It is thoroughly well settled that a plaintiff in ejectment, where the defendant is in possession, must show a valid legal title, and not merely an equitable one, to authorize recovery. When no such title is shown, the defendant's possession is sufficient for his protection. (*Moorehouse* v. *Phelps*, 21 How., 294.)

In a court of the United States actions for the recovery of land can be maintained only upon a legal title, not upon an incipient equity, even if the latter might have sustained the action under State statutes in courts of the State in which the Federal court is sitting. (*Sheirburn* v. *De Cordova*, 24 How., 423; *Swayze* v. *Burke*, 12 Pet., 11; *Fenn* v. *Holmes*, 21 How., 481; *Hooper* v. *Scheimer*, 23 How., 235; *Smith* v. *McCann*, 24 How., 398; *Oaksmith* v. *Johnson*, 92 U. S., 343; *Langdon* v. *Sherwood*, 124 U. S., 74; *Redfield* v. *Parks*, 132 U. S., 239.)

In the courts of the United States the distinction between legal and equitable rights and remedies is strictly maintained and rigidly enforced, albeit sitting in States where such rights and remedies have been amalgamated by statutes. Equitable interests can be maintained, not in an action of ejectment, but in an equitable proceeding only, where they can properly be investigated with a due regard to the rights of others which may have intervened. (*Carpentier* v. *Montgomery*,

13 Wall., 480.) Thus in *Loring* v. *Palmer* (118 U. S., 321) it was held that where the interest of the *cestui que trust* was not created by the deed to the trustee, but by the original contract of purchase in connection with certain contemporaneous correspondence, the legal title did not vest in the *cestui que trust* by virtue of the statute of Michigan abolishing passive trusts, but that he merely took an equitable title, and hence his remedy was in a court of equity and not by action of ejectment.

By the statute of Arkansas (Sand. & H. Dig., sec. 2578) the pleadings in an action of ejectment are very nearly assimilated to those of a suit in equity to quiet title. The pleading is special and not general. In his declaration the plaintiff is required to set forth "all deeds and other written evidences of title on which he relies for the maintenance of his suit, and shall file copies of the same as far as the same can be obtained, as exhibits therewith, and shall state such facts as shall show a *prima facie* title in himself to the land in controversy." This provision of the Arkansas statute, however, is binding upon the Federal court only in so far as it affects the procedure, the practice, and the pleadings in an action of ejectment. Even if the Arkansas statute undertook (which it does not) to permit a plaintiff in ejectment to recover upon proof of an equitable title, such State law would be binding only upon the State courts and would have no force in the circuit courts of the Union (*Hooper* v. *Scheimer*, 23 How., 235), in which said courts the plaintiff can only recover upon proof of the legal title.

But the Arkansas statute of course does regulate the procedure and practice and pleading in the circuit courts of the United States for that district, and hence under this statute if the documents under which the plaintiff claims title do not show upon their face the existence of the legal title to the land in the plaintiff then the declaration should be dismissed upon demurrer, and in considering the demurrer the court is to consider not only the allegations in the declaration, but likewise the legal effect of all the exhibits filed in connection with the declaration. (*Fagg* v. *Martin*, 53 Ark., 453.)

Bearing in mind these well-settled principles, we proceed to an examination of the declaration and exhibits in the action at bar.

The plaintiffs ground their right to recover upon an alleged grant to Don Juan Filhiol by Miro, governor-general of the province of Louisiana, bearing date February 22, 1788 (Transcript, p. 4), which said grant was made in obedience to a memorial of said Filhiol to said Miro on December 12, 1787, and in conformity with an alleged figurative or conjectural survey made by Carlos Trudeau, the surveyor-general of the province, by direction of the said governor.

There is also set up in the declaration an alleged deed of cession or grant from the said Don Juan Filhiol to his son-in-law, Narcisso Bourgeat, and a deed of retrocession or reconveyance of the same land from said Narcisso Bourgeat back to said Don Juan Filhiol. (Transcript, pp. 5, 6, and 7.) It is, however, entirely unnecessary to notice this conveyance from

Filhiol to Bourgeat and from Bourgeat back to Filhiol. The stream can rise no higher than its source. Of course, if Filhiol had no title to convey he could convey none to Bourgeat, and under the deed of reconveyance from Bourgeat he could not possibly take any greater or different estate than that which he held under the original Spanish grant.

It is argued by the plaintiffs in error that this deed of cession, made in November, 1803, before Texier, military and civil commandant of the district, and the deed of retrocession, made in July, 1806, before Poidras, the judge of the court of Pointe Coupee, had the effect of establishing the legality of the original grant from the governor-general to Filhiol, because, by the regulations of Morales, the controller and intendent of the province of Louisiana, in whom at the date in question (November 25, 1803), the power to grant lands had been vested by the King by royal order of October 22, 1798, notaries public in New Orleans and commandants of posts were forbidden to take acknowledgments of conveyances of land obtained by cession unless the seller or grantor presented and submitted the title which he had obtained, and he was required to insert in the deed the metes and bounds and other descriptions which resulted from the title. It is therefore argued that since these officers must be presumed to have performed their duty under these requirements, hence Filhiol must have presented his title under the original grant to Texier at the time of his sale of the land to Bourgeat, and that the same were examined and approved by said Texier, and that among the documents of title so presented it

must be presumed that the survey of Trudeau was included, which, in turn, it is argued, must be held to prove that said Trudeau had actually made a survey of the land at that time, to wit, in 1803.

There are many answers to this contention. In the first place, the regulations of O'Reilly require that such survey must have been made "at the same time" at which the grant was made, and to prove that a survey was made in 1803 is not sufficient to establish a grant alleged to have been made by the governor-general in 1788, which not only does not mention any such survey, but on the contrary, expressly refers to a survey to be made.

In the second place, the regulations of Morales relied upon requires that the acknowledging officer shall be careful to insert in the deed the metes and bounds and other descriptions which resulted from the title. Now, turning to this deed of cession, made by Filhiol to Bourgeat, in 1803, we find it described as a tract of land with a front of 84 arpents and a depth of 42 arpents on each side of the stream called *La Source d'eau Chaude*, about 2 leagues distance from its entrance into Ouachita, having the Hot Springs for its center, its limits extending in parallel lines east and west to its full depth and bound on both sides by lands belonging to the Crown. This description utterly fails to meet the requirements of Morales by inserting in the deed the metes and bounds and other descriptions resulting from the title; and it negatives the idea that the scrivener who drew the deed had before him any survey of the land conveyed. There is no description

here by metes and bounds, and it would be impossible for any surveyor to actually locate the land in question from the description given.

In the third place, the notaries public and other officers before whom deeds could be acknowledged, under the regulations of Morales, are not given any judicial power to pass upon the validity of any title submitted to them by a person desiring to convey the same, and even if they were of opinion that the proof submitted showed title in the grantor yet that opinion can not be binding upon the judiciary when the title is subsequently called into question by an action at law against strangers.

The deed of cession from Filhiol to Bourgeat and the deed of retrocession from Bourgeat to Filhiol therefore may safely be eliminated from this case. The plaintiffs' title, if it exists at all, must be derived from the original deed of grant to Filhiol by the governor-general, Miro, and the validity of such grant, in turn, depends upon whether it conformed to the royal orders of the King of Spain relative to the making of such grants which had the force and effect of what with us is known as statute law, and without compliance with which no valid grant could be made by the governor-general.

At the time that this alleged grant was made the regulations of Governor O'Reilly, dated February 18, 1770, were in full force in the province of Louisiana, the twelfth section of which said regulations was as follows:

> All grants shall be made in the name of the King by the governor-general of the province, who will *at the same time* appoint a surveyor to fix the bounds thereof, both in front and depth, in the presence of the judge ordinary of the district and two adjoining settlers, who shall be present at the survey. The above-mentioned four persons shall sign the process verbal which shall be made thereof. The surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the governor, another shall be directed to the governor-general, and a third to the proprietor to be annexed to the title of his grant.
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> (See 5 Am. St. Papers, 289–290. *United States* v. *Boisdore*, 11 How., 76.)

These regulations were approved by the royal order of the King of Spain of August 24, 1770, after which they had the force of statutes which no official had the right to disregard. (*United States* v. *More*, 12 How., 209–218.)

A royal order of the 24th of August, 1770, states that O'Reilly had communicated the regulations made by him to his Government, and these declaring that the granting of lands had been confided by His Majesty to the governor and *comisario ordenader*, he considered it would be better in future that the governor alone should be authorized by His Majesty to make those grants. The order to the governor then proceeds: "The King having examined these dispositions and propositions of the said lieutenant-general, approves them, and also that it should be you and your successors in

that government only who are to have the right to distribute the royal lands, *conforming in all points as long as His Majesty does not otherwise dispose to the said instructions, the date of which is the 18th of February of this present year.* (See 12 How., at p. 218.)

The title to the public lands in the Territory of Louisiana was of course in the King of Spain. This title could only be obtained by grant, either from the King himself or else from the precise person designated by the King for that purpose, to wit, the governor-general, and in the precise manner provided by the King. By the regulations of O'Reilly the following essential things were required to be done: First, at the time of making the concession the governor must appoint a surveyor to fix the bounds of the land; second, the judge ordinary of the district and two adjoining settlers must be present when the survey is made; third, these four persons should make out a process verbal or detailed statement of the survey; fourth, the surveyor must make three copies of this survey; fifth, one copy of the surveyor's survey must be deposited in the office of the scrivener or clerk or secretary of the governor; sixth, a like copy must be sent to the governor-general; seventh, a third copy must be delivered to the claimant or proprietor and by him attached or annexed to the title of his grant.

The complaint in the present action and the exhibits filed in support thereof wholly fail to allege or show that any of these essential prerequisites of a valid grant were done or performed, and hence the declaration of the plaintiffs and the exhibits thereto attached

wholly fail to allege or show that the plaintiffs' ancestor ever had legal title to the demanded premises.

In *White* v. *United States* (1 Wall., 680–687) it was said that the Spaniards were a formal people, and their officials were usually careful in the administration of their public affairs. It will not do to say, as is argued on behalf of the plaintiffs in error, that these regulations of O'Reilly were merely forms by him prescribed for the regulation of grants of the royal lands, and that they were binding only upon himself and might be departed from by his successors in office. These regulations of O'Reilly's were submitted to the King, and by him sanctioned and approved, and by his royal proclamation it was expressly stipulated that while in the future he would designate the governor-general as his royal representative in the dispensation of his favor by the grants of public lands within his domain, yet in acting as his agents for this purpose he expressly directed that they and their successors should conform in all respects to the instructions and regulations of O'Reilly's, which His Majesty had sanctioned and promulgated. An attempted grant, therefore, by the governor-general, which did not in all respects conform to these rules and regulations, would be void and would convey no right, title, or interest to the grantee. It would be just as ineffectual for this purpose as would be the issuance of a patent by the Commissioner of the General Land Office for public lands of the United States which were not open to preemption, settlement, or sale. Such an instrument would be void upon its face, would convey no title, and might be impeached

collaterally or in any other way. (*Eastman* v. *Salsbury*, 21 How., 426; *Stoddard* v. *Chambers*, 2 How., 284.)

The applicant for a Spanish grant presented to the governor a petition, or "requete," as it was called, accompanied by what was called a "figurative" or "conjectural" plan or map of the land desired. This map was not made from an actual survey, but served to indicate in a general way the location of the land sought to be acquired, so that the officials might know whether it was vacant or not and something of its prospective value. Without some such information the governor could not act advisedly in making or refusing the grant. In all cases there was an actual survey on the ground before the title of the Crown was divested, followed by an actual putting of the grantee in pedal possession. This delivery of possession under the Spanish law was a formal and indispensable requisite, and is thus described in *United States* v. *Davenport* (15 How., 5):

> The official went on the land in the presence of the grantee and of witnesses, and took the grantee by the right hand and walked with him a number of paces from north to south and the same from east to west, and then, letting go of his hand, the grantee walked about at pleasure on the said territory, pulling up weeds and making holes in the ground, planting posts, cutting down bushes, throwing clods of earth on the ground, and doing other things in token of the possession in which he had been placed, in the name of His Majesty, of said lands with the boundaries and extensions as prayed for.

This putting into possession under the Spanish law was analogous, if not equivalent, to the livery of seisin at common law, and both ceremonies appear to have been derived from the feudal law. The figurative plan or preliminary survey has sometimes been called a "chamber survey" (*Hunnicutt* v. *Peyton*, 102 U. S., 361), because it was made in an office or other place remote from the land indicated. (*Scull* v. *United States*, 98 U. S., 420.) The grant upon this chamber survey delivered out for actual survey did not mean the delivery of a perfect title, but of a mere incipient right, which authorized an actual survey and which required both an actual survey and a subsequent confirmation by the governor. (*United States* v. *Boisdore*, 11 How., 99.) Until an actual survey was made on the ground the grant or concession was only an inchoate right or a floating, unlocated claim. (*United States* v. *Hanson*, 16 Pet., 200.) To seek an analogy from the present laws, it was like a grant of land made by the Congress in aid of the construction of a railway. Such grants are usually made by words *in præsenti* upon the filing of the map of general location; and yet, while the grant is one *in præsenti*, it is a mere float, attaching to no specific particle of ground until the filing of the map of definite location and the acceptance and approval of such map in the Interior Department. (*United States* v. *Southern Pacific R. R. Co.*, 146 U. S., 570; *St. Paul, etc., R. R. Co.* v. *Phelps*, 137 U. S., 528.)

The actual survey which is required as a condition precedent to passing title to the grantee consisted of

running lines with the compass and chain, establishing corners, marking trees, and making field notes and plats of the work. These are the ingredients of an actual survey. (*Winter* v. *United States*, Hempst., 362 Fed. Cas., No. 17,985.) Until actual survey made, no specific particle of land was segregated from the public domain; and unless such a survey was made before the cession of Louisiana to the United States no title passed to Filhiol, his heirs or grantees. (*United States* v. *Lawton*, 5 How., 26.)

Not only is the want of legal title shown by the absence of allegations or documentary proof of actual survey, but the absence of such survey is affirmatively shown upon the face of the grant itself. The grant (Rec., p. 4) recites that the governor understands "that this land *is to be* measured so as to include the site or locality known by the name of Hot Springs, as is expressed by the figurative plan and certificate of the said surveyor," etc.; and thus, by the very terms of the grant itself, the existence of such actual survey is made a condition precedent to any investure of title. The governor approved the "figurative," "conjectural," or "chamber survey" of Trudeau, but he, as he was required to do under the law, stipulated that the land referred to should be measured and identified by an actual survey, which should leave nothing to conjecture. No such actual survey is pleaded or alleged in the petition, nor is any such actual survey produced or accounted for, nor is it alleged or shown that if any actual survey was made it was made in compliance

with the O'Reilly regulations, fixing the bounds thereof, both in front and depth, in the presence of the judge ordinary and two adjoining settlers present at the survey, and copies thereof made and returned to the persons named in the twelfth article of said O'Reilly regulations. For even if the land had been actually surveyed, as required by the regulations of Governor O'Reilly, still the claim would have had no validity unless a copy of the survey had been filed in the office of the scrivener of the governor, as therein provided. As was said by this court, in *Fremont* v. *United States* (17 How., 554), "the examination of the surveyor, the actual survey, and the return of the plat were conditions precedent, and he had no equity against the Government and no just claim to a grant until they were performed." And again, this court says:

> This concession was an incomplete grant and did not vest a perfect title to the property in the grantee according to the Spanish usages and regulations until a survey was made by the proper official authority and the party thus put in possession, together also with a compliance with other conditions if contained in the grant or in any general regulations respecting the disposition of the public domain. Possession with definite and fixed boundaries was essential to enable him to procure from the proper Spanish authority a complete title. (*United States* v. *Hughes*, 13 How., 2; *United States* v. *Hanson*, 16 Pet., 199.)

In the absence of such survey no right, either legal or equitable, vested in the plaintiffs' ancestor. The

original concession granted on his petition was a naked authority or permission, and nothing more. (*Fremont* v. *United States*, 17 How., 554; *Peralta* v. *United States*, 3 Wall, 440.) This survey could not "be done by conjecture. Lines and corners must be established by the finding so as to close the survey." (*Denise* v. *Ruggles*, 16 How., 243; *Hunnicutt* v. *Peyton*, 102 U. S., 539; *De la Croix* v. *Chamberlain*, 12 Wheat., 601; *Purvis* v. *Harmenson*, 4 La. Ann., 421.)

Such an inchoate claim as Filhiol possessed at the time of the cession was of no kind of validity as against the United States, and even if it had been expressly confirmed by act of Congress it would have derived its validity not from the Spanish grant but from the act of Congress alone. (*Dent* v. *Emmeger*, 14 Wall., 312.) The treaty between the United States and France of April 30, 1803, whereby the United States bound itself to protect the rights of the inhabitants of the province, has no application to a merely inchoate claim which was not binding on the Governments of either Spain or France, but which existed in entreaty. The treaty added nothing to the law of nations on the subject, and precisely the same rule has always been applied to inchoate entreaties made under the laws of the United States. (*Frisbie* v. *Whitney*, 9 Wall., 192; *Yosemite Valley case*, 15 Wall., 87; *Shipley* v. *Cowan*, 91 U. S., 330; *Hot Springs cases*, 92 U. S., 713.) The title of Filhiol, then, being incomplete at the time of the cession of the Territory of Louisiana to the United States, the treaty between France and the United

States imposes upon the United States no obligation to make a title to lands of which the grantee had neither an actual seisin nor a seisin in law. (*United States* v. *Marinda*, 16 Pet., 153; *United States* v. *Hughes*, 13 How., 2.)

The necessity for requiring a strict scrutiny into claims of this sort and of requiring a due performance of all the requirements of the Spanish law has been often emphasized in litigation over these alleged Spanish grants. See *United States* v. *Samperyac* (Hempt., 118, 7 Pet., 222), in which it was shown that 117 decrees rendered in the superior court of the Territory of Arkansas were set aside on bills of review because such decrees had all been passed on forged grants. See also the case of *United States* v. *King* (3 How., 773), where a suit was brought on a Spanish grant that had been forged.

The certificate of the surveyor, Trudeau (Rec., pp. 4 and 5), does not supply this deficiency. This instrument reads as follows:

> I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ouachita River, in the district of Arkansas, at about two leagues and a half distant from said river, *to be verified* by the figurative plan which accompanies, in conformity with ——— ——— of the 6th of the present month of December, in the current year 1788.

This is by no manner of means a certificate that the surveyor has actually measured this land in the manner provided in O'Reilly's regulations, to wit, by going upon the land itself and fixing the bounds thereof both in front and depth in the presence of the judge ordinary of the district and two adjoining settlers, who shall be present at the survey. The only certification here given is that Trudeau has *measured* the league of land on the *figurative or conjectural plan*, which accompanies the petition or memorial to the governor, and that such measurement upon the plan is subject to subsequent verification by actual survey on the land itself in the manner and form as required by the twelfth regulation of O'Reilly. Even, however, if this certificate had attempted or pretended to certify to an actual survey as required by O'Reilly's regulation, such statement could have no probative value whatever, for it is well settled that a recital in a grant that prerequisites have been complied with is not sufficient ground for a presumption that they have been observed. The only proof of this survey is the existence of one of the three copies of the plat required to be made, one of which was to be given to the governor, another to be registered in the office of the scrivener of the governor, and a third to be annexed by the grantee to his grant. (*Fuentes* v. *United States*, 22 How., 443.)

This court will take judicial notice of geography and history, and from such sources it is easily seen why Trudeau does not certify to any actual survey of

this land or to having put the grantee into actual possession thereof. In *Muse* v. *Arlington Hotel Company* (68 Fed. Rep., at p. 646), the reason is thus stated:

> The certificate of Trudeau refers to the petition or memorial upon which Filhiol's grant is based, and to an accompanying figurative plan. Neither of these is produced, nor is the loss of either shown, nor are the contents of either alleged. It is easy to account for the fact that Trudeau does not certify to any actual survey or any delivery of possession. In 1788 the nearest white settlements to the hot springs were insignificant and remote. The lands were occupied by Indians. To reach them would require a journey of many days, involving privation and terror. The lands had then no commercial value. Hence there was a total noncompliance with the regulations of O'Reilly.

It is therefore submitted that there is an utter failure in the declaration or exhibits of the plaintiffs to allege the legal title to the demanded premises in the plaintiffs' ancestor, or, as required by the Arkansas statute, to state such facts as shall show a *prima facie* title to the land in controversy. The judgment of the lower court, sustaining the demurrer and dismissing the plaintiffs' action, therefore, should, for this reason, be affirmed.

II.

Neither the alleged grant from Miro nor the alleged certificate of survey by Trudeau describes any land which is capable of identification or segregation from the public domain; nor are said descriptions sufficient to identify the land alleged to have been granted with the demanded premises.

It is well settled that where a deed, by reason of an imperfect description, is not effectual to convey the land, although it may be reformed in equity, it is not sufficient to sustain an action of ejectment. (*Prentice* v. *Stearns*, 113 U. S., 435; *Prentice* v. *Northern Pacific R. R. Co.*, 154 U. S., 163.)

The description of the land in the alleged grant from Miro (Rec., p. 4), is as follows:

> A tract of land 1 league square situated in the district of Arkansas on the north side of the river Ouchita, at about 2½ leagues distant from the said river Ouchita, and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters.

The description given in the alleged certificate of survey by Trudeau (Rec., p. 4), is as follows:

> I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ouchita River, in the district of Arkansas, at about 2½ leagues distant from said river, to be verified by the figurative plan which accompanies, etc.

Neither the alleged grant nor the alleged certificate describes any land which is capable of identification. "A tract of land 1 league square" does not, as a term of description, suggest any boundary whatever. A tract of land described as being "about 2½ leagues distant from the river Ouchita" is indefinite to the point of vagueness. The exact distance from the river is not mentioned, nor is there anything to indicate at any point on the river to serve as a place of beginning. It is argued on behalf of the plaintiffs in error that the hot springs must be presumed to be the center of the tract, but no such presumption can be indulged in. (*Locompte* v. *United States*, 11 How., 125.) It is a rule of "universal application in the construction of grants, which is essential to their validity, that the things granted should be so described as to be capable of being distinguished from other things of the same kind, or to be capable of being ascertained by extraneous testimony." (*Buyck* v. *United States*, 15 Pet., 225.) In that case it was held by this court that "it is not possible to locate any land, as no part was granted;" and the court further added that "the public domain can not be granted by the courts." This rule has been frequently applied to other cases based on Spanish grants. (*Hunnicutt* v. *Peyton*, 102 U. S., 359; *United States* v. *Castellero*, 2 Black., 20.) In *Vilemont* v. *United States* (13 How., 267) the court said:

> Nor is it possible to make a decree fixing any one side line or any one place of beginning for a specified tract of land.

And again, in *Villabolos* v. *United States* (10 How., 556), the court said:

> In cases of a vague description this court has uniformly held that no particular land was severed from the public domain by the grant and that no survey could be ordered by the courts of justice.

In *Scull* v. *United States* (98 U. S., 413) a map was attached to the figurative survey. A surveyor testified that from the map he could survey the land and mark out its metes and bounds and claimed that he had made an accurate survey of the land claimed; but the court held that there was no valid grant. In *United States* v. *Boisdore* (11 How., 93) the claim was held to be void for the want of an actual survey. The court said that the identity of the land could not be fixed and that it could not be ascertained that any specific tract was severed from the public domain by the grant at the time that Spain ceded Louisiana, "and the claim can not be ripened into a complete title by our decree, as we have only power to adjudge what particular tract of land was granted. Our action is judicial. We have no authority to exercise political jurisdiction and to grant, as the governors of Spain had and as Congress had." See also *United States* v. *Delespine* (15 Pet., 319).

Not only is it impossible to identify or distinguish any specific tract of land by the imperfect and unintelligible descriptions in the grant and alleged certificate, but it is also impossible to identify the land alleged to

have been granted with the land described in the petition as the demanded premises. The demanded premises are thus described in the petition (Rec., p. 8):

> A parcel of land situated in the city of Hot Springs, Garland County, Ark., the same being that on which the bath house "Independent" is situated, on the permanent reservation at Hot Springs, Ark., described as follows: "Bath-house site No. 8, on the plan formulated and filed in the Interior Department by the superintendent of the Hot Springs Reservation on the 12th day of May, 1891, numbered 1162, commencing 30 feet northerly from station 8, on said plan, on the front bath-house line, and thence northerly along said line 100 feet to a point 30 feet northerly of station 9 on said line, thence easterly 75 feet, thence southerly 100 feet, and thence westerly 78 feet to the place of beginning."

By what possible means can a court identify this parcel of land with any part of a parcel of land situate in the district of Arkansas, on the north side of the Ouachita River, and about 2½ leagues distant from said river? Even if the grant relied upon be conceded to be valid and as vesting in the plaintiffs' ancestors the legal title of the tract described, still there is nothing to show that the lands occupied by the defendants in error are a part of the same lands granted to the plaintiffs in error. This being true, the demurrer to the petition was properly sustained.

III.

The petition does not allege nor do the exhibits filed in support thereof show that the claimants or their ancestors in title ever had such actual possession of the demanded premises as is necessary to support an action of ejectment.

If the alleged possession of the premises be based upon the prior possession of the plaintiffs, the allegations are wholly insufficient.

As against a person rightfully in possession—in contradistinction to a mere trespasser or squatter—it is incumbent upon the plaintiff, in an action of ejectment, to allege and prove that he had actual possession of the demanded premises and that such possession continued without interruption down to the period of ouster by the defendant.

Prior possession alone will entitle the plaintiff to recover against a mere intruder, provided such possession was continuous, but the action to recover upon such prior possession must be brought within a reasonable time after its loss, and such prior possession will be deemed to have been abandoned by any unreasonable delay in bringing an action, unless satisfactorily explained. (*Sabariego* v. *Maverick*, 124 U. S., 261, 299, 300.) In *Sabariego* v. *Maverick* (*supra*), this court, speaking through Mr. Justice Matthews, said (at pp. 297–298):

> This rule is founded upon the presumption that every possession peacefully acquired is lawful, and is sustained by the policy of protecting the public peace against violence and disorder.

But as it is intended to prevent and redress trespasses and wrongs, it is limited to cases where the defendants are trespassers and wrongdoers. It is therefore qualified in its application by the circumstances which constitute the origin of the adverse possession and the character of the claim on which it is defended. It does not extend to cases where the defendant has acquired the possession peacefully and in good faith under color of title. (*Lessee of Fowler* v. *Whitman*, 2 Ohio St., 270; *Drew* v. *Swift*, 46 N. Y., 204.) And in the language of the supreme court of Texas, in *Wilson* v. *Palmer* (18 Tex., 592, 595), the evidence must show a continuous possession, or at least that it was not abandoned, to entitle the plaintiff to recover merely by virtue of such possession. That is to say, the defendant's possession is, in the first instance, presumed to be rightful. To overcome that presumption the plaintiff, showing no better right by a title regularly deduced, is bound to prove that, being himself in prior possession, he was deprived of it by a wrongful intrusion of the defendant, whose possession, therefore, originated in trespass. This implies that the prior possession relied on by the plaintiff must have continued until it was lost by the wrongful act of the defendant in dispossessing him. If the plaintiff can not show an actual possession and a wrongful dispossession by the defendant, but claims a constructive possession, he must still show facts amounting to such constructive possession. If the lands when entered upon by the defendant were apparently vacant and actually unoccupied, and the plaintiff merely proves an antecedent possession at some prior

time, he must go further and show that his actual possession was not abandoned; otherwise he can not be said to have had even a constructive possession.

Tested by these principles the allegations of the petition are utterly insufficient. It is not pretended or alleged that any actual possession of the land in question was ever had by the plaintiffs' ancestor until the year 1819, and then only by implication, in the following allegation (Rec., p. 5): "The plaintiffs further state that their said ancestor, the said Don Juan Filhiol, in the year 1819, leased the said hot springs to one Dr. Stephen P. Wilson, for five years, and that shortly after making the said lease to the said Wilson, to wit, in the year 1821, the said Filhiol died, as aforesaid, and since the death of their said ancestor the plaintiffs have always urged their title to said property, and employed agents and attorneys to do so for them," etc.

It is true that in a preceding paragraph the declaration alleges that, as a matter of law, the certificate of Trudeau was a delivery of the "judicial possession of said land" to their ancestor. But this is merely alleging an issue of law, and is wholly insufficient to support an allegation of actual possession. It will be observed, therefore, that the declaration admits that there was no actual occupancy of this land until the year 1819, and then only through a lessee, whose occupation, however, is not alleged, which occupancy ceased in 1821, and has never since existed in the plaintiffs. It is not alleged in the declaration that their occupancy ceased by reason of the unlawful

entry of the defendants in error in 1821, but, on the contrary, it is expressly alleged that the defendants in error did not enter upon the land until January, 1897. (Rec., p. 8.) It will be seen, therefore, that, according to the allegations of this petition, the demanded premises were either vacant or else in the possession of some person other than the plaintiffs in error from the year 1821 to the year 1897, when the entry of the defendants in error occurred. It is manifest, therefore, that when the entry of the defendants in error occurred the plaintiffs in error were not in possession of the land, and consequently could not have been unlawfully ousted from said possession by the defendants in error, and the allegation to that effect in this declaration is shown by the declaration itself to be false and impossible, since at the time of the entry of the defendants in error the plaintiffs in error had not been in possession of the demanded premises for more than seventy-eight years.

IV.

The declaration does not allege, nor do the exhibits filed in support thereof show any right of possession to the demanded premises in the plaintiffs in error.

It is thoroughly well settled that the action of ejectment is a possessory action, and that in order to entitle the plaintiff to recover he must have the right of possession. The action involves both the right of possession and the right of property, and if the facts developed show that the plaintiff is not in equity and

conscience entitled to disturb the possession of the defendants, the action must fail. (*Cincinnati* v. *White*, 6 Pet., 431; *Love* v. *Simms*, 9 Wheat., 515; *Dickerson* v. *Colgrove*, 100 U. S., 578; *Kirk* v. *Hamilton*, 102 U. S., 68, 75, 78.)

But inasmuch as this doctrine is founded upon equitable estoppel, or estoppel *in pais*, which will be fully treated in Division VI of this brief, its further consideration will not be indulged in here.

V.

The decisions of this court, and of other courts of the United States, of which this court will take judicial notice, establish the fact that the legal title, as well as the ownership and possession, of the demanded premises was, until August 24, 1818, outstanding in the Quapaw Indians, and that since said time the title, ownership, and possession of the demanded premises has been outstanding in the United States of America by treaty of purchase with said Indians, and has never been sold or otherwise disposed of.

It is well settled that the defendants in an action of ejectment may show a paramount outstanding and subsisting title in a stranger and thereby defeat the action of the plaintiff. (*Doswell* v. *De la Lanzo*, 20 How., 29; *Smith* v. *McCann*, 24 How., 398; *Love* v. *Simms*, 9 Wheat., 515; *Greenleaf* v. *Birth*, 6 Pet., 302; *Marsh* v. *Brooks*, 8 How., 223.) In *Doswell* v. *De la Lanzo* (*supra*) this court said:

> In an action of ejectment the defendant may show a paramount outstanding and subsisting title for the same land in a stranger, to defeat the plaintiff.

In *Smith* v. *McCann* (*supra*) this court said:

> In an action of ejectment the lessor of the plaintiff must show a legal title in himself to the land he claims and the right of possession under it at the time of the demise laid in the declaration and at the time of the trial. He can not support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery; nor is the defendant required to show any title in himself; and if the plaintiff makes out a *prima facie* legal title, the defendant may show an elder and superior one in a stranger, and thereby defeat the action.

The Spanish laws prevailing at the time of this alleged grant with regard to the Indian tribes were far more humane than any laws that have ever existed in this country. (5 Am. St. Papers, pp. 226, 232, 234.) Yet it has always been held that the Indian right of occupancy in the United States was sacred until extinguished by cession to the Federal Government. (*United States* v. *Cook*, 19 Wall., 591; *R. R. Co.* v. *United States*, 92 U. S, 742; *Cherokee Nation* v. *Georgia*, 5 Pet., 1.) So all Spanish grants were made subject to the rights of Indian occupancy. They did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize any one to interfere with it. (*Chouteau* v. *Molony*, 16 How., 239.) Hence it is easy to account for the fact that in this case there was no survey and no delivery of possession. The Indian title to the land in controversy was not extinguished until

August 24, 1818. (*Hot Springs cases*, 92 U. S., 698.) At that time the pretended title of Filhiol had long since lapsed, because it was not possible to perfect it after the cession of the territory of Louisiana to the United States, by the treaty between the United States and France, ratified in 1803. The grant relied upon imposed upon the United States no obligation to make a title to lands of which the grantee had neither actual seisin nor seisin in law at the date of that treaty. (*United States* v. *Miranda*, 16 Pet., 153.)

In the year 1875 this court held (*Hot Spring cases*, 92 U. S., 698) that the third section of an act of Congress, approved April 20, 1832 (4 Stats., 505), which is still in force, enacts that 4 sections of land, including the Hot Springs in Arkansas, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatsoever; that the Indian title to said lands was not extinguished until August 24, 1818, nor were the public surveys extended over them until 1838, nor has any sale of them ever been authorized by law; that no part of said lands was ever subject to preemption or to location, and that no claim thereto has ever been validated or confirmed by any act of Congress.

Manifestly, therefore, the title, possession, and right of possession of the demanded premises was outstanding in the Indians until the year 1818, and since that time has been and still is outstanding in the United States of America. These facts and laws, having been determined by prior decisions of this court, of which this court will take judicial notice, having been brought

to the attention of the court, it is manifest that the declaration at bar does not and can not state a cause of action, and the demurrer thereto was properly sustained.

VI.

The plaintiffs are estopped from bringing this action by the facts surrounding the transaction as established by the decisions of this court and by the public laws and records of the United States, of which courts will take cognizance upon a demurrer, and which need not be specially pleaded or proved.

It is thoroughly well settled that the action of ejectment is a possessory action and that the plaintiff, to entitle him to recover, must allege and prove the right of possession. (*Cincinnati* v. *White*, 6 Pet., 431; *Love* v. *Simms*, 9 Wheat., 515; *Dickerson* v. *Colgrove*, 100 U. S., 578; *Kirk* v. *Hamilton*, 102 U. S., 68; *Sabariego* v. *Maverick*, 124 U. S., 261, 298, 299, 300.)

In an action of ejectment a defense of equitable estoppel may be sufficient. An action of ejectment involves both the right of possession and the right of property; and where the facts developed show that the plaintiff is not in equity and conscience entitled to disturb the possession of the defendant, the latter may rely upon the doctrine of equitable estoppel to protect his possession. (*Dickerson* v. *Colgrove*, 100 U. S., 578; *Kirk* v. *Hamilton*, 102 U. S., 68, 76–79.)

In *Kirk* v. *Hamilton* (*supra*) this court, speaking through Mr. Justice Harlan, said:

> We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title

to land can not be extinguished or transferred by acts *in pais* or by oral declarations. "What I induce my neighbor to regard as true is true as between us, if he has been misled by my asservation," became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent, in *Wendell* v. *Van Rensselaer*, 1 Johns. Ch., 344: "There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowngly, although he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title without making his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." While this doctrine originated in courts of equity, it has been applied in cases arising in courts of law. In *King* v. *The Inhabitants of Butterton* (6 Durnf. & E., 554) Mr. Justice Lawrence said: "I remember a case some years ago in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land." In 2 Smith Lead. Cas., pp. 730–740 (7 Am. ed., with notes by Hare & Wallace) the authorities are carefully examined. It is there said that there has been an increasing disposition to apply the doctrine of equitable estoppel in courts of law. Again (pp. 733, 734): "The question presented in these and other cases which involve the

operation of equitable estoppels on real estate is both difficult and important. It is undoubtedly true that the title to land can not be bound by an oral agreement, or passed by matter *in pais*, without an apparent violation of those provisions of the statute of frauds which require a writing when realty is involved. But it is equally well settled that equity will not allow the statute to be used as a means of effecting the fraud which it was designed to prevent, and will withdraw every case not within its spirit from the rigor of its letter, if it be possible to do so without violating the general policy of the act, and giving rise to the uncertainty which it was deemed to obviate. It is well established that an estate in land may be virtually transferred from one man to another without a writing, by a verbal sale accompanied by actual possession, or by the failure of the owner to give notice of his title to the purchaser under circumstances where the omission operates as a fraud; and although the title does not pass under these circumstances, a conveyance will be decreed by a court of equity. It would therefore seem too late to contend that the title to real estate can not be passed by matter *in pais* without disregarding the statute of frauds; and the only room for dispute is as to the form in which relief must be sought. The remedy in such cases lay originally in an application to chancery, and no redress could be had in a merely legal tribunal except under rare and exceptional circumstances. But the common law has been enlarged and enriched under the principles and maxims

of equity, which are constantly applied at the present day in this country, and even in England, for the relief of grantees, the protection of mortgagors, and the benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is, as its name implies, chiefly, if not wholly, derived from courts of equity, and as those courts apply it to any species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary, whatever may be the nature of the interest at stake; and there is nothing in the nature of real estate to exclude those wise and salutary principles which are now adopted without scruple in both jurisdictions, in the case of personalty. And whatever may be the wisdom of the change through which the law has encroached on the jurisdiction of chancery, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. This view is maintained by the main current of decision."

This question, in a different form, was examined in *Dickerson* v. *Colgrove* (100 U. S., 578). That was an action of ejectment, and the defense, based upon equitable estoppel, was adjudged to be sufficient. We there held that the action involved both the right of possession and the right of property, and that, as the facts developed showed that the plaintiff was not in equity and conscience entitled to disturb the possession of the defendants, there was no rea-

son why the latter might not under the circumstances disclosed rely upon the doctrine of equitable estoppel to protect his possession.

In view of these settled principles, let us examine the history of this claim as disclosed by the decisions of this court and the public laws of the United States The following facts are taken from the decision of this court in the *Hot Springs cases* (92 U. S., 698, at pp. 699, 714, 715).

The title to the well-known watering place in the State of Arkansas, called the "Hot Springs," has been contested by a number of claimants for nearly half a century. The springs are situated in a narrow valley or ravine, between two rocky ridges, in one of the lateral ranges of the Ozark Mountains, about 60 miles to the westward of Little Rock. Although not easily accessible, and in a district of country claimed by the Indians until after the treaty made with the Quapaws, in 1818, they were considerably frequented by invalids and others as early as 1810 or 1812; but no permanent settlement was made at the place until a number of years afterwards. Temporary cabins were erected by visitors and those who resorted there to dispose of articles needed by visitors, but were only occupied during a portion of the year. The public surveys were not extended to that portion of the country until 1838 (p. 699).

It is well known that the territory purchased of the French Government in 1803 was, on the following session of Congress, divided into two Territories, one

called the Territory of Orleans, comprising west Florida and the present State of Louisiana, and the other called the district of Louisiana and comprising the whole region west of the Mississippi and north of that State. The land titles, which had been perfected and located by surveys, offered no difficulties; but there were many inchoate titles, which had never been perfected, and which, by the laws of France and Spain, the claimants had a right to perfect. In order that the Government of the United States might know what claims it was bound in good faith to respect, measures were taken to have all outstanding claims brought in and recorded and located by surveys, where these should be necessary. By the act of March 2, 1805 (2 Stats., 324), the Territory of Orleans was divided into two land districts, for each of which a register was appointed; but for the district of Louisiana an officer was created, called the recorder of land titles, who continued for many years to exercise important functions in regard to the public lands in the district, even after the appointment of a surveyor and of registers and receivers under the general land laws. The act referred to required every person claiming lands, *whether by complete or incomplete title*, within a limited time to deliver to the registers of Orleans, or to the recorder of land titles in the district of Louisiana, a notice of his claim with a plat of the tract of land claimed, and also his grant, order of survey, or other written evidence of his claim, which documents the said registers and recorders, respectively, were to record in proper books. Claims not so presented and recorded within

the proper time were to be barred as against grants from the United States. The act further provided for the appointment of two additional persons in each district to act with the register or recorder as a board of commissioners to examine and decide upon the claims which should be presented, whose duty it was, after deciding, to report their decision to Congress and to deposit the same with all the evidences and documents in the offices of the register and recorder, respectively, within whose district the lands lay. The report of these commissioners and the acts of Congress confirmatory thereof formed the basis of the title derived from the French and Spanish authorities. And this constitution of the office and duty of the recorder of land titles in the district of Louisiana led to the importance subsequently attached to the return and registration of other surveys in the same office. It was there that the officers of the Government looked, or were supposed to look, for all authenticated claims to lands in the district. No lands were supposed to be appropriated or segregated from the public domain unless recorded or registered there.

There is no allegation in the petition and no pretense that the ancestor of the plaintiffs ever complied with the provisions of this act, and not having complied therewith the claim is, as was expressly adjudicated by this court in the Hot Springs cases, of no validity whatever. (See pp. 714, 715, 716.)

The next act of Congress by which the United States endeavored to set at rest the claims to the land in the Hot Springs Reservation was the act of May 26,

1824 (4 Stats., 52), entitled "An act enabling claimants to lands within the limits of the State of Missouri and the Territory of Arkansas to institute proceedings to try the validity of their claims." It provided for the adjustment of all claims arising out of Spanish and French grants by petitions to be filed by the claimants in the district courts of the United States. The fifth section of this act is as follows:

> *And be it further enacted*, That any claim to lands, tenements, or hereditaments within the purview of this act, which shall not be brought by petition before said courts within two years from the passing of this act, or which, after having been brought before said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred both at law and in equity, and no other action at law or proceeding in equity shall ever thereafter be sustained in any court whatever in relation to said claims.

It is not alleged in the petition that the claimants or their ancestor in title ever complied with the provisions of this act.

The third act of Congress by which it was attempted to settle the disputes concerning the Hot Springs Reservation was the act of May 3, 1870 (16 Stats., 149), wherein it was provided that—

> Any person claiming title, either legal or equitable, to the whole or any part of the four sections of land constituting what is known as the Hot Springs Reservation, in Hot Springs

> County, in the State of Arkansas, may institute against the United States in the Court of Claims and prosecute to final decision any suit that may be necessary to settle the same: *Provided*, That no such suits shall be brought at any time after the expiration of ninety days from the passage of this act, and all claims to any part of said reservation upon which suit shall not be brought under the provisions of this act within that time shall be forever barred.

Under the provisions of this act numerous suits were brought in the Court of Claims for the recovery of the various parcels of land within the Hot Springs Reservation, but were all dismissed by said court for the reason that the claims had no foundation either in law or equity, and upon appeal the decree of the Court of Claims was confirmed by this court and all of the cases were dismissed. (*Hot Springs cases*, 92 U. S., 698.)

It is not alleged in the petition that the claimants or their ancestor in title ever complied with the provisions of this act of Congress, or ever instituted the suit therein required to be brought in the Court of Claims. But it does appear from the published decisions of the Court of Claims that in the year 1893 Roland M. Filhiol, administrator of Don Juan Filhiol, and one of his heirs at law, did institute a suit in the United States Court of Claims for the recovery of rent of the land here sought to be recovered, and that the same was dismissed by that court because said suit was barred under the provisions of the first section of the Hot Springs act of 1870, quoted *supra*. (See *Filhiol, administrator*, v. *United States*, 28 C. Cls. R., 110.)

It is contended on behalf of the plaintiffs in error that the periods of limitation provided in the above-recited acts can not apply as a bar to the present action for the reason that said periods of limitation were only applicable to suits against the United States, and that the present action is not against the United States, but against individuals in possession of the demanded premises, and that although they hold under lease from the United States, yet an action against them is not an action against the United States so as to deprive the courts of jurisdiction over a suit against the sovereign. This contention is made upon the authority of *United States* v. *Lee* (106 U. S., 196) and *Tindal* v. *Westly* (167 U. S., 204). It is not necessary to so contend, and such is not here our purpose in invoking the statutes above referred to. The purpose is not to suggest to the court that this is a suit against the United States which can not be maintained for the reason that the Government has not given its consent to such a suit, or to contend that the periods of limitation mentioned in the above-recited acts are to be applied to this action as the statute of limitations is applied to an ordinary action at law. Our purpose is to show that the proprietor of the demanded premises, in whom is outstanding the legal title and the actual possession thereof, has ever since 1805 given to every adverse claimant ample opportunity to establish his rights to the demanded premises, first, by the provision concerning the recording of the title; second, by authorizing a suit to be

brought in the Arkansas courts, and, third, by authorizing suits to be brought in the United States Court of Claims; and that notwithstanding such ample opportunity to establish their claim to the demanded premises the claimants have utterly failed to establish or to attempt to establish the same, but on the contrary have slept upon their rights without embracing the opportunities thus given to them for nearly one hundred years. This being so, the principle of equitable estoppel announced at the opening of this division of the brief runs against the plaintiffs with full force and effect.

Not only is the culpable silence and neglect of the claimants shown by their failure to embrace the opportunities given to them by the above-recited acts to establish their title, but it is further shown by notorious facts of history and geography, of which this court will take judicial cognizance. These facts can not be better stated than by an excerpt from the decision of the circuit court for the eastern district of Arkansas in the case of *Muse* v. *Arlington Hotel Company* (68 Fed. Rep., pp. 650, 651):

> As shown by the facts alleged in the complaint, Juan Filhiol never paid anything for the land sued for. He never paid even the trivial fee necessary to be paid in order to have his grant registered. He never complied with the requirements of the grant or with the requirements of the laws in force at the time that, as alleged, the lands were donated to him. The taxes that have accrued on the property covered by the

grant during so many years, with accrued interest, must amount to a very large sum, of which it is extremely improbable that the plaintiffs have paid anything. In 1788 the Hot Springs were upon lands occupied and owned by a tribe of Indians and were far from any European settlement. They were in the midst of an unbroken wilderness, and they could be reached from such places as New Orleans or St. Louis only after many days of arduous travel through a country where there were only rude Indian trails instead of roads. Such a journey would have been attended by perils and by every kind of discomfort. It could only be made by men in robust health and in the full vigor of life. Before the application of steam to navigation our water courses would have impeded rather than assisted the traveler. The country had but few inhabitants. New Orleans was only a small town and St. Louis was an obscure village on the extreme margin of the vast and unexplored wilderness stretching from the Mississippi to the Pacific. Only De Soto, in 1541, and a few later explorers of the white race, had ever seen the springs. Their medicinal qualities a hundred and six years ago were unknown, but having been ascertained after the cession, in 1818, the United States Government bought up the title of the Indians. In 1832, recognizing the great importance of the springs to the general public, it reserved the property from entry and sale; and for their use it now holds it in trust, if not in deed, for the heirs of Filhiol. In the meantime, before the commencement of this suit, a thriving and prosperous city had been

built up around the springs. The Federal Government had spent large sums for hospitals and in improving and beautifying its property. By the joint labor and money of private citizens, the municipality, and the Federal Government, streets had been laid out, parks had been established, churches and schoolhouses had been erected, and railway connections with the rest of the continent had been created. In hotels all provision had been made for guests and for the traveling public, at the expense of millions of dollars. Many of the citizens and others have made these investments largely because they supposed that the springs themselves would be perpetually under the control of the Federal Government and would be managed with its usual fairness and generosity. If they should be decreed to be private property the event would simply be a public and private calamity of incalculable magnitude. They would become an unending monopoly; their control the subject-matter for greed, avarice, selfishness, extortion, and all the whims and caprices of private individuals under no responsibility to the public; owners who might, if they thought fit, wholly exclude others from the healing waters, or impose such conditions upon access to them as would be intolerable. The plaintiffs, however, after so long a delay, during which time they have never spent a cent in the great work of making these many enduring and costly improvements, are now asking that they may reap what they have not sown. But it has often been held that if one

sees another making costly improvements on his lands, believing them to be his own, without any assertion of title, he will be estopped from claiming an adverse title. (*Erwin* v. *Lowry*, 7 How., 172; *Kirk* v. *Hamilton*, 102 U. S., 68; *Close* v. *Glenwood Cemetery*, 107 U. S., 466; *Jowers* v. *Phelps*, 33 Ark., 465.) No stronger case than the present, as coming within this principle, is likely to occur.

It is submitted therefore that from every possible point of view the plaintiffs have wholly failed to state a cause of action; that the demurrer of the defendants in error was properly sustained and the action properly dismissed by the court below, and that the judgment of the court below should be affirmed.

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